STATE OF MICHIGAN

COURT OF APPEALS

DAVID NABIL BAZZI,

Plaintiff-Appellee,

v

EMERALD CONSTRUCTION OF MICHIGAN, BORIS BRODSKY, and DIMITRI BRODSKY,

Defendants-Appellants,

and

CITY SERVICES, INC., ACCURATE ADJUSTMENT COMPANY, DAVID A. NORRIS, KURT W. NORRIS, and COMERICA BANK,

Defendants.

UNPUBLISHED
September 10, 1999

No. 201420
Wayne Circuit Court
LC No. 94-412610 CK

DAVID NABIL BAZZI and FADWA B. FADEL,

Plaintiffs-Appellees,

v

COMERICA BANK,

Defendant-Appellant,

and

EMERALD CONSTRUCTION OF MICHIGAN, INC., DAVID A. NORRIS, DIMITRI BRODSKY, BORIS BRODSKY, CITY SERVICES, INC., ACCURATE ADJUSTMENT COMPANY, INC, STATE FARM FIRE AND CASUALTY

No. 201496
Wayne Circuit Court
LC No. 94-412610 CK

COMPANY, WESTERN ADJUSTMENT & APPRAISAL COMPANY, INC. and KURT W. NORRIS,

Defendants.

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

In this consolidated appeal, defendants Emerald Construction, Inc. ("Emerald"), Boris Brodsky ("Boris"), Dimitri Brodsky ("Dimitri") and Comerica Bank ("Comerica") appeal as of right from the trial court's orders denying defendants' motions to vacate the arbitration award and judgment entered in favor of plaintiff David Nabil Bazzi. We affirm.

I. Facts

Plaintiff's residence, which was insured by State Farm Fire & Casualty Company ("State Farm"), was destroyed by a fire. Plaintiff was induced by Dimitri and David Norris ("Norris") to forego retaining Western Adjustment and instead retain City Services, Inc., a defunct corporation. After convincing plaintiff to contract with them, Dimitri and Norris presented plaintiff with a contract on behalf of defendant Emerald Construction. Plaintiff contracted with defendant Emerald to restore the premises. He also executed a power of attorney appointing his sister, Fadwa B. Fadel ("Fadel"), to settle the fire claim with State Farm. Plaintiff alleged that Norris and Dimitri, employees of Emerald, wanted plaintiff to sign a proof of loss agreement and endorse a check that State Farm had issued to plaintiff, Standard Federal Bank ("Standard Federal"), Accurate Adjustment Co, Western Adjustment and Appraisal Co, Inc, and Emerald. Plaintiff wanted to speak to Fadel before endorsing the check, but Norris and Dimitri told him that they had telephoned Fadel and she had approved the transaction. In fact, Fadel was never contacted and never gave her approval. Plaintiff signed the proof of loss agreement and endorsed the check. The check was then presented to Standard Federal, which withheld the balance of plaintiff's mortgage ($37,300) and issued a cashier's check payable to Emerald and plaintiff in the amount of $67,700, which was deposited in a bank account at Comerica belonging to Emerald. It is undisputed that plaintiff's signature was forged on the cashier's check.

Plaintiff filed suit in April, 1994, against numerous corporate and individual defendants alleging seven counts. In October, 1994, plaintiff amended the complaint to add Comerica and Boris. A count was added to the amended complaint which alleged that Boris was individually liable because Emerald was a fictitious entity by virtue of the fact that it had failed to file its annual corporate report with the State. In addition, the amended complaint alleged in a conclusory fashion that Boris was individually liable for his actions as an agent of Emerald. Also in October, 1994, the parties agreed to submit to binding arbitration to settle the plaintiff's suit. Contrary to defendants' position, the agreement to

arbitrate does not limit the scope of plaintiff's claims to the pleadings and answers as they stood subsequent to the filing of plaintiff's amended complaint. Rather, the litigants agreed as follows:

> 1. That the above matter shall be dismissed without prejudice for the reason the court may entertain the entry of a Judgment, to allow the enforcement of the Judgment or allow creditors proceedings.
>
> 2. That arbitration shall proceed with a single arbitrator, the former Wayne County Circuit Court Judge, the Honorable Thomas Roumell.
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> 3. That the decision of the arbitrator shall be binding and final upon all parties to the litigation.
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> 4. That the arbitrator may assess attorney fees, costs and interest as he sees fit against any party.
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> 5. That the costs of the arbitrator shall be borne equally by the three parties hereto.
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> 6. That testimony may be taken and witnesses presented at the hearing.
>
> 7. That the decision of the arbitrator may be entered at a subsequent time in this court.

The arbitration award provided that defendants Emerald, Boris Brodsky, Dimitri Brodsky, Kurt W. Norris and David Norris were individually and jointly liable to plaintiff for special damages for the insult of fraud in the amount of $40,000. The arbitration award further provided that all defendants, including Comerica, were liable to plaintiff for $67,700 for the forged check, plus costs and attorney fees totaling $21,517.56, of which Comerica was responsible for $7,172.50, and the other defendants $14,345.06.

The arbitration award also provided that Comerica was entitled to be reimbursed by Emerald and the individual defendants for the amount Comerica would pay to plaintiff ($74,872.50) plus $9,734.25 for costs incurred by Comerica in defense of this suit.

A judgment was entered in the circuit court consistent with the arbitration award. Defendants filed separate motions to vacate the arbitration award and judgment, which the trial court denied. Defendants appeal as of right.

II. Bazzi v Emerald, et al.

In Docket No. 201420, Emerald, Boris and Dimitri first argue that the arbitrator committed an error of law by attaching liability to Boris when there was no showing that Boris personally made any representations to plaintiff or was otherwise personally liable to plaintiff. We disagree.

Our authority to vacate an arbitration award is governed by MCR 3.602(J), which states in pertinent part:

> (1) On application of a party, the court shall vacate the award if:
>
> * * *
>
> (c) the arbitrator exceeded his or her powers.

An arbitrator exceeds his or her authority when: (1) an error of law plainly appears from the face of the award or such documentation as the parties agree will constitute the record; or (2) when the arbitrator acts beyond the material terms of the contract from which he primarily draws his authority. *Dohanyos v Detrex Corp*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996).

General principles of arbitration preclude courts from upsetting arbitration awards for reasons relating to the merits of a claim. *Dohanyos, supra* at 177. In *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991), our Supreme Court held:

> [A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way. Callahan, Bramble & Lurie, *supra*, p 191; CJS, Arbritration § 162, pp 428-429. See also *Gavin, supra*, p 429; *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Disckson Teachers' Ass'n*, 393 Mich 583, 594-595; 227 NW2d 500 (1975).

With these principles in mind, we conclude that the arbitrator's award against Boris Brodsky should not be modified. Preliminarily, we note that the arbitrator, former Circuit Judge Thomas Roumell, took proofs over seven days and issued a thirty-nine page decision in which he found that "credibility was the major, if not the sole, most important factor to be decided in reaching the final decision herein." The arbitrator further found that "defendants' arguments were without credibility and therefore unbelievable in their sound and content . . . . [T]he plaintiff's account as to what transpired is to be given full faith and acceptance."

Boris' claim that the arbitrator manifestly disregarded the law by attaching personal liability to Boris is in fact an attack on the merits of plaintiff's claim. Defendants' brief on appeal states in pertinent part:

> The evidence has been fabricated by the plaintiff. The arbitrator was informed by appellants that the annual reports were filed and the corporate entity, Emerald Construction was reinstated under MCLA 450.1925 and the rule in *Bergy Bros v Zeeland Feeder Pig*, 415 Mich 286 (1982), so that no individual liability attaches to Boris Brodsky as a matter of law.

It is legally irrelevant whether Emerald was reinstated as a corporate entity.[1] The claim of reinstatement was made by appellants. However, the appellants were found to be wholly lacking in credibility by the arbitrator. Thus, we are bound pursuant to *Gordon Sel-Way, supra*, to conclude that the arbitrator implicitly found that Emerald was not a legal corporate entity. *Id*. at 486.

There being evidence to support a finding of a lack of corporate existence, we cannot conclude that the arbitrator made a clear legal error or exceeded his authority by finding Boris personally liable. While the law treats a corporation as a separate entity from its stockholders, even where one person owns all the corporation's stock, when this fiction is used to subvert justice it may be ignored by the courts. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). There is no single rule delineating when a corporate entity may be disregarded. Courts review actions to pierce the corporate veil on a case by case basis. The corporate veil may be disregarded upon a showing that:

> "[One,] the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." [*Foodland Distributors, supra*, at 457, quoting *SCD Chemical Distributors, Inc. v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994).]

Plaintiff specifically alleged in the first amended complaint that Emerald and its agents committed fraud. Moreover, there was evidence presented from which the arbitrator could find that: (1) Emerald was a mere instrument of Boris, Boris being the president and sole shareholder of Emerald; (2) Emerald was used to fraudulently receive insurance proceeds from the insurance settlement for plaintiff's home; and (3) plaintiff was injured when Emerald accepted proceeds from the insurance settlement and then failed to rebuild the house or refund the money. Accordingly, we find no error of law on the face of the arbitration award which would require that the arbitration award be set aside.

Next, defendants argue that the arbitrator exceeded his authority by awarding special damages and attorney fees to plaintiff. We disagree. An arbitration agreement is a contract. *Beattie v Autostyle Plastics*, 217 Mich App 572, 577; 552 NW2d 181 (1996). The scope of arbitration is determined by the contract. *Id.* The Michigan Supreme Court has stated that "an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary." *Gordon Sel-Way, supra* at 497.

The arbitration agreement in this case specifically provided that "the arbitrator may assess attorney fees, costs and interest as he sees fit against any party." Defendants' argument that the parties intended to restrict the award of attorney fees to situations authorized by statute or court rule contradicts the plain language of the arbitration agreement and is unsupported by the lower court record. Accordingly, we cannot find that the arbitrator acted beyond the material terms of the arbitration agreement by awarding attorney fees to plaintiff.

We further find that the arbitrator did not exceed his authority by awarding "special damages for the insult of fraud and for all the sufferings, embarrassment and mistreatment [plaintiff] endured from the

defendants herein including Emerald Construction of Michigan." There was no express language in the arbitration agreement precluding the arbitrator from awarding special damages to plaintiff. Moreover, exemplary damages for mental or emotional distress are recognized in Michigan where tortious conduct independent of the breach of contract is alleged and proven. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 251; 531 NW2d 144 (1995); *Phinney v Perlmutter*, 222 Mich App 513, 531; 564 NW2d 532 (1997). In this case, plaintiff alleged fraud as a distinct cause of action, and the arbitrator found that fraud had been committed by defendants (excluding Comerica). In light of the parties' broad arbitration agreement we find that there was no substantial or material error evident from the face of the arbitration award.

III. Bazzi v Comerica

In Docket 201496, Comerica argues that the arbitrator committed an error of law in failing to apply the intended payee rule which would have made Comerica exempt from liability to plaintiff for accepting the forged check. We disagree. A bank may escape liability for honoring a check on a faulty or improper endorsement, or even with no endorsement, if the bank can prove that the intended payee received the proceeds of the check and the drawer suffered no loss proximately caused by the drawee's improper payment. *Comerica Bank v Michigan Nat Bank*, 211 Mich App 534, 538; 536 NW2d 298 (1995).

The arbitrator found that the intended payee theory did not apply in this case because the agreement that would have made Emerald an intended payee was void. Unlike in *Comerica Bank, supra*, where the intended payee received the proceeds of the check and used the money, Emerald was not the intended payee. Plaintiff was the intended payee, but plaintiff did not receive the proceeds of the check or use the money from the check. Plaintiff was deprived of his interest in the check as a result of the forgery and Comerica's breach of presentment warranty. Therefore, we conclude that the arbitrator's finding that the intended payee rule did not apply was not a substantial or material error on the face of the arbitration award.

We also find no merit in Comerica's argument that the arbitrator erred in allowing plaintiff to maintain a claim against Comerica because plaintiff did not receive actual delivery of the check. Pursuant to MCL 440.3420; MSA 19.3420, an action for conversion of an instrument may not be brought by a payee who did not receive delivery of the instrument "either directly or through an agent or a co-payee." In this case Emerald received delivery of the check and deposited the check in its account. Because plaintiff was Emerald's co-payee, plaintiff received delivery through Emerald. Plaintiff's action against Comerica was not precluded by MCL 440.3420; MSA 19.3420; therefore, we find no error on the face of the arbitration award.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Appellants have failed to present any evidence to this Court to establish that Emerald was in fact reinstated as a legal entity.